No. 98-6598

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees

v.

L.N. HAGAN, in his official capacity as the Director of the Alabama Department of Public Safety, and ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR AND AS AMICUS CURIAE

_____

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT
CASE NO. 98-6598

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Alabama Civil Liberties Union

American Civil Liberties Union Foundation
of Northern California, Inc.

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with the parties that oral argument may assist the Court in resolving the issues raised in this appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is printed in 12 point Courier.

STATEMENT OF JURISDICTION

Plaintiffs filed a complaint in the United States District Court for the Middle District of Alabama, alleging that the Alabama Department of Public Safety and its director violated, inter alia, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and its implementing regulations. For the reasons discussed in this brief, the district court had jurisdiction over the case pursuant to 28 U.S.C. 1331.

This appeal is from an interlocutory judgment entered on June 3, 1998, as amended by an order of July 13, 1998. The defendants filed a notice of appeal on July 28, 1998. The United States has moved to intervene on appeal to address a potential constitutional challenge to the abrogation of Eleventh Amendment immunity, over which this Court has jurisdiction pursuant to 28 U.S.C. 1291. See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993).

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MISCELLANEOUS:

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* Authorities chiefly relied upon are marked with asterisks.

INTEREST OF THE UNITED STATES

This appeal involves the constitutionality of Congress' abrogation of States' Eleventh Amendment immunity for private suits under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. The United States has a unique interest in defending the constitutionality of its statutes, one distinct from the private parties' claims of injury. See 28 U.S.C. 2403(a); Diamond v. Charles, 476 U.S. 54, 64-65 (1986).

This appeal also presents the issue whether a person may bring a judicial action to enforce substantive Title VI regulations. Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations. See Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) (permitting private citizens to sue under Title VI is "fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute").

Finally, this appeal involves the construction of regulations issued by the United States Department of Transportation and the United States Department of Justice that prohibit a federal fund recipient from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their * * * national origin." This appeal may thus significantly affect the agencies' administrative enforcement responsibilities.

STATEMENT OF THE ISSUES

1. Whether 42 U.S.C. 2000d-7, which abrogates States' Eleventh Amendment immunity from discrimination suits brought under Title VI, is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

2. Whether private persons may sue a recipient of federal funds to enforce the requirement, embodied in regulations implementing Title VI, that recipients not administer their programs in a manner to cause unjustified discriminatory effects on the basis of national origin.

3. Whether recipients of federal funds were on notice that Title VI and its implementing regulations could be violated by a decision to deny the benefits of their programs to those who cannot read English.

STATEMENT OF THE CASE

1. Procedural History

Plaintiffs, a class of individuals legally residing in Alabama who are qualified to obtain drivers' licenses but cannot do so because they are not sufficiently fluent in English, brought this action for declaratory and injunctive relief against the Alabama Department of Public Safety and its administrator in his official capacity (Op. 1244).[1] They alleged that defendants' implementation of its English-Only policy violated the Equal Protection Clause (through 42 U.S.C. 1983), and that "defendants' refusal to administer the examination in languages

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[1/] "Op. ___" refers to the pages of the district court's reported opinion in Sandoval v. Hagan, 7 F. Supp.2d 1234 (M.D. Ala. 1998).

other than English or to allow for the use of translators or interpretive aids discriminates against [them] on the basis of national origin," in violation of regulations promulgated by federal grant agencies under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (Op. 1244).

Based on plaintiffs' stipulation, the district court granted defendants judgment as a matter of law on the claim that the policy constituted intentional discrimination on the basis of national origin (Op. 1313). The court has reserved a ruling, pending this appeal, on plaintiffs' claim that the defendants violate the Equal Protection Clause by discriminating on the basis of language (7/13/98 Order 2-3). The district court held that the Eleventh Amendment was no bar to the Title VI claim because Congress validly removed States' immunity (Op. 1268-1275), and that plaintiffs could seek judicial enforcement of Title VI implementing regulations (Op. 1251-1264). After a bench trial, the district court ruled in favor of the plaintiffs on their Title VI claim (Op. 1313).

As a remedy, the district court enjoined the defendants from "enforcing * * * the Department's English-Only Policy," and ordered the defendants to "fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses" that are "consistent" with the court's opinion (Op. 1315-1316). The court subsequently stayed its injunction and the order to submit a plan after the parties agreed to an interim testing program pending the outcome of any appeal (7/13/98 Order 3). This appeal followed.

2. Statement Of The Facts

According to the district court's findings (none of which is challenged as clearly erroneous by defendants), the Alabama Department of Public Safety receives millions of dollars in federal funds every year from the United States Department of Transportation and the Department of Justice (Op. 1249-1250).

Prior to 1991, defendants administered written driver's license examinations in approximately 14 foreign languages (Op. 1284). In 1991, due to the ratification of a state constitutional amendment declaring English the official language of Alabama, the defendants adopted an "English-Only" policy, requiring all portions of the driver's license examination process be administered in English only, and forbidding the use of interpreters, translation dictionaries, or other interpretive aids, even if privately provided (Op. 1284, 1285-1286).

The court found that even though a small percentage of residents of Alabama are natives of a foreign country (Op. 1297-1298), "the vast majority of [non-English speakers in the state of Alabama] are from a country of origin other than the United States" (Op. 1283, 1279 n.45), and thus that the English-Only policy disparately impacted on foreign-born individuals (Op. 1298). It also found that the rule had significant adverse effects by excluding otherwise qualified drivers from obtaining licenses (Op. 1292-1293). It then examined each of defendants' rationales for imposing the rule, and found that none of them were substantiated, and that plaintiffs had proffered effective alternative practices that result in less disparate impact while addressing the defendants' concerns (Op. 1298-1313).

3. Standard Of Review

Claims of Eleventh Amendment immunity and challenges to the constitutionality of federal statutes are reviewed de novo. See Sea Servs. of the Keys, Inc. v. Florida, 156 F.3d 1151, 1152 (11th Cir. 1998); United States v. Jackson, 111 F.3d 101, 101 (11th Cir.), cert. denied, 118 S. Ct. 200 (1997). The entry of a permanent injunction is reviewed for an abuse of discretion. See Simmons v. Conger, 86 F.3d 1080, 1085 (11th Cir. 1996).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under Title VI and its regulations to remedy discrimination on the basis of national origin. 42 U.S.C. 2000d-7 contains an express statutory abrogation of Eleventh Amendment immunity for Title VI suits. This abrogation is a valid exercise of Congress' power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Title VI. In addition, Section 2000d-7 is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. Five courts of appeals have upheld Section 2000d-7 on this basis. Under either power, the abrogation for Title VI suits is constitutional and the district court had jurisdiction over the action. In any event, this suit may proceed against defendant Hagan in his official capacity under the doctrine of Ex parte Young, 209 U.S. 123 (1908).

The regulations promulgated by the Departments of Transportation and Justice to implement Title VI prohibit recipients of federal funds from using criteria or methods of administering their programs that have the effect of subjecting individuals to discrimination because of their national origin. Defendants concede that these regulations are valid. Consistent with the decisions of the Supreme Court and this Court, every court of appeals to address the issue has held that these valid substantive regulations are enforceable by private parties in federal court. Permitting private plaintiffs to enforce the discriminatory effects regulations is consistent with the statutory provisions providing for administrative review of recipients' activities, and will further the purposes of Title VI by assuring that individuals can seek effective redress for their injuries.

Here, plaintiffs were injured by defendants' "English-Only" policy. Policies that require fluency in English in order to receive benefits can have a disparate impact on the basis of national origin. The Supreme Court so held in Lau v. Nichols, 414 U.S. 563 (1974), and the agencies responsible for implementing Title VI have consistently espoused that view in regulations and interpretive guidance. Recipients of federal funds, like defendants, had notice that unless sufficiently justified, such policies would not be permitted so long as they elect to accept federal financial assistance. Defendants' concerns regarding the appropriate remedy in this case are premature, as they have not submitted, and the district court has not yet ruled on, any proposals to redress the violation.

ARGUMENT

I

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Defendants argue (Br. 34-37) that the Eleventh Amendment barred the district court from hearing this action. Questions of Eleventh Amendment immunity "must be resolved before a court may address the merits of the underlying claim(s)." Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998), petition for cert. filed (Sept. 14, 1998) (No. 98-998).

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations, quotations, and brackets omitted).

Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of * * * title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.]." The Supreme Court has characterized Section 2000d-7 as meeting its requirement that Congress must unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Lane v. Pena, 518 U.S. 187, 198 (1996); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 72 (1992); id. at 78 (Scalia, J.,

concurring); see also Lussier v. Dugger, 904 F.2d 661, 669 (11th Cir. 1990). Indeed, defendants concede (Br. 35) that Congress intended to remove their Eleventh Amendment immunity. The only question is whether it is a valid exercise of any of Congress' powers.[2]

As explained more fully below, defendants waived their Eleventh Amendment immunity to Title VI suits when they elected to accept federal funds after the effective date of Section 2000d-7. Moreover, Congress properly abrogated Eleventh Amendment immunity from Title VI claims pursuant to its authority under Section 5 of the Fourteenth Amendment. In any event, the Eleventh Amendment is no bar to this action proceeding against defendant Hagan in his official capacity under the doctrine of Ex parte Young, 209 U.S. 123 (1908).

[2/] Defendants suggest (Br. 35) that Congress' abrogation does not extend to the claims at issue here because they arise under the agency regulations. This is incorrect for two reasons. First, as we discuss infra, the cause of action to enforce the regulations arises through the implied statutory right of action. Second, the abrogation itself is not limited to violations of Section 601, 42 U.S.C. 2000d, but all of "title VI," including Section 602, 42 U.S.C. 2000d-1. Thus, the abrogation clearly encompasses violations of Section 602, including the regulations agencies are obliged to issue under that section.

A. Defendants Waived Their Eleventh Amendment Immunity To Title VI Suits By Accepting Federal Funds After The Enactment Of Section 2000d-7

Section 2000d-7 may be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. The Supreme Court's decision in Seminole Tribe does not somehow prohibit such an exercise of the Spending Clause power. Indeed, it is well-settled that Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity so long as, as here, the statute provides unequivocal notice to the States of this condition.

States may waive their Eleventh Amendment immunity and agree to be sued in federal court. See Seminole Tribe, 517 U.S. at 65; Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); In re Burke, 146 F.3d 1313, 1318 (11th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3394 (Dec. 1, 1998) (No. 98-906); Premo v. Martin, 119 F.3d 764, 770-771 (9th Cir. 1997), cert. denied, 118 S. Ct. 1163 (1998). A State may manifest its waiver in at least two ways: (1) through an express statutory provision (not at issue here), or (2) by participating in a program "where Congress explicitly abrogates a state's Eleventh Amendment immunity as an express condition of participation in federal programs." Cate v. Oldham, 707 F.2d 1176, 1182 n.4 (11th Cir. 1983). Under the second method of waiver, a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v.

Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program").

Atascadero held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. And it reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. Id. at 247; see also Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring).

Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985). And Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Title VI if they accepted federal funds. See Lane, 518 U.S. at 200 (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7). As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it]

makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986).

Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, by putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Title VI. Thus, as the Ninth Circuit held in a case involving Section 2000d-7's abrogation for Section 504 claims, Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

The defendants do not contest that Congress has the authority under the Spending Clause to require States that accept federal funds to comply with the substantive requirements of Title VI and its regulations. See Grove City College v. Bell, 465 U.S. 555, 575 (1984); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983) (White, J.); id. at 631 n.26 (Marshall, J.); Lau v. Nichols, 414 U.S. 563, 569 (1974). Indeed, "[c]ourts have held innumerable times that the federal government may impose conditions on the receipt and use of federal funds." Alabama v. Lyng, 811 F.2d 567, 568 (11th Cir.), cert. denied, 484 U.S. 821 (1987) (collecting cases).

Nor do defendants dispute that Congress may authorize individuals to enforce their Title VI right to be free from national origin discrimination through private rights of action

in court. They seem to argue (Br. 36), however, that Congress cannot condition the federal funds on a State's agreement to waive its Eleventh Amendment immunity so that these suits can be heard in federal court. But defendants do not explain why they should not be held to this part of the bargain. When exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987). Indeed, the Court held that the federalism-based limitations on Congress' power to directly regulate States that are embodied in the Tenth Amendment do "not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. (citing Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947)). That is because, as this Court explained, "those who seek federal financial assistance, whether [they] be states, non-profit organization[s] or individuals, have a choice whether to participate in a federal program. But once that decision to participate is made, the grant recipient is bound by any mandatory rules imposed by federal law." Autery v. United States, 992 F.2d 1523, 1527 n.7 (11th Cir. 1993) (dictum), cert. denied, 511 U.S. 1081 (1994); see also Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject.").

The defendants' reliance (Br. 36) on the "germaneness" requirement, as articulated in Dole, is simply unavailing. As the Supreme Court explained, this limitation on the Spending

Clause power has been "suggested (without significant elaboration)" in prior cases, but has never been adopted by the Court. 483 U.S. at 207; see also Oklahoma v. Schweiker, 655 F.2d 401, 407 & n.10 (D.C. Cir. 1981). Nor have defendants explained why ensuring that private plaintiffs may bring their Title VI claims in federal court is not "germane" to assuring that federal funds do not subsidize operations that discriminate.

Having elected to continue accepting federal funds after the effective date of Section 2000d-7, defendants have waived their Eleventh Amendment immunity to suit in this case. See Clark, 123 F.3d at 1271; Beasley v. Alabama State Univ., 3 F. Supp.2d 1304, 1311-1315 (M.D. Ala. 1998), appeal pending, No. 98-6300 (11th Cir.); Litman v. George Mason Univ., 5 F. Supp.2d 366, 375-376 (E.D. Va. 1998). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

B. Section 2000d-7 Is A Valid Exercise Of Congress' Power Under Section 5 Of The Fourteenth Amendment

Section 2000d-7 is also a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment to permit private suits against States for discriminating against individuals on the basis of race and national origin in violation of federal law.

1. Congress need not expressly state its intent to rely upon its Section 5 authority. See EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983); Lesage v. Texas, 158 F.3d 213, 217-218 (5th Cir. 1998). Nevertheless, the legislative history makes clear

that in enacting Section 2000d-7, Congress so intended. See id. at 218-219; Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976) (relying on legislative history in determining whether "Congress exercised its power under § 5 of the Fourteenth Amendment"). Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of these constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that

> [t]he proposed amendment * * * fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts.

132 Cong. Rec. 28,624 (1986) (citations omitted).

Moreover, it is also clear that Congress' decision to abrogate States' Eleventh Amendment immunity from discrimination cases arising under Title VI is a proper exercise of its Section 5 power. This was conclusively resolved in Fitzpatrick, in which the Court held that Congress' decision to abrogate States' Eleventh Amendment immunity from sex discrimination suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., was a proper exercise of its Section 5 power. See 427 U.S. at 456. The Supreme Court explained that "the Eleventh Amendment, and the principle of state sovereignty which it

embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Ibid. (citation omitted). The Court concluded that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials." Ibid.[3]

Not surprisingly, every court of appeals considering the constitutional basis of Section 2000d-7 since Seminole Tribe was decided has held that it was an appropriate exercise of Congress' Section 5 authority. See Lesage, 158 F.3d at 217-219; Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997);

[3/] That Title VI and its regulations prohibit more than simply disparate treatment does not preclude it from being "appropriate" legislation to enforce the Equal Protection Clause. See City of Boerne v. Flores, 117 S. Ct. 2157, 2169 (1997) ("Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause."); United States v. Marengo County Comm'n, 731 F.2d 1546, 1559 & n.20 (11th Cir.), cert. denied, 469 U.S. 976 (1984); Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980); accord Reynolds v. Alabama Dep't of Transp., 4 F. Supp.2d 1092, 1098-1112 (M.D. Ala. 1998) (upholding Title VII disparate impact standard as valid Section 5 statute), appeals pending, Nos. 98-6474 & 98-6600 (11th Cir.).

Clark, 123 F.3d at 1270.

2. The defendants seem to suggest (Br. 36) that Section 2000d-7 cannot be valid Section 5 legislation because Title VI was not originally enacted pursuant to the Fourteenth Amendment. We believe it appropriate to focus first on whether Congress validly enacted the abrogation pursuant to Section 5. See Lesage, 153 F.3d at 218-219; Varner v. Illinois State Univ., 150 F.3d 706, 713 n.7 (7th Cir. 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 838-839 n.7 (6th Cir. 1997). For even assuming arguendo that Title VI was solely Spending Clause legislation when originally enacted,[4] that would not be

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[4/] As a non-discrimination statute, Title VI as applied to State programs and activities evidences a "legislative purpose * * * that supports the exercise" of Congress' Section 5 power. EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (discussing how to determine whether legislation can be upheld on the basis of Section 5). Just as the legislative history of Title VI's original enactment evidences Congress' intent to exercise its authority under the Spending Clause, see Guardians, 463 U.S. at 599, there is also evidence in the legislative history that Congress intended to exercise its powers under Section 5. The same memorandum cited by Justice White in Guardians for the proposition that Title VI is Spending Clause legislation also referred to the Fifth and Fourteenth Amendments as sources of Congress' authority to enact the statute. See 110 Cong. Rec. 1527 (1964) (memorandum by Rep. Celler); see also id. at 1529 (Rep. McCullough) ("the Federal Government, through Congress,

(continued...)

dispositive as to the constitutional basis of Section 2000d-7.

In Fitzpatrick, for example, the Supreme Court found that the abrogation of States' Eleventh Amendment immunity for Title VII suits was a valid exercise of Congress' Section 5 authority, see 427 U.S. at 456, even though Title VII itself originally governed only private employers and was enacted pursuant to the Commerce Clause. See United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979). Similarly, courts of appeals have held that the

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[4/](...continued)
certainly has the authority, pursuant to the 14th amendment, to withhold Federal financial assistance where such assistance is extended in a discriminatory manner"); id. at 2467 (Rep. Celler) (noting anomaly of federal support for discrimination in face of Equal Protection Clause); id. at 6553 (Sen. Douglas) (civil rights bill will "carry out the specific authorization granted in" Section 5).

The Supreme Court has not definitively resolved the question, see Franklin, 503 U.S. at 75 n.8, and there is no need to do so in this appeal. Compare Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982) (assuming that Title IX, which was modeled on Title VI, is Section 5 legislation), and Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) (stating that Section 504 of the Rehabilitation Act, which was modeled on Title VI and Title IX, was enacted pursuant to Section 5), with Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397-1399 (11th Cir. 1997) (en banc) (viewing Title IX as Spending Clause legislation), petition for cert. granted, 119 S. Ct. 29 (1998).

extension to the States and concomitant abrogation contained in the Equal Pay Act are valid exercises of Section 5 authority, even though the Act was initially enacted pursuant to the Commerce Clause. See Ussery v. Louisiana, 150 F.3d 431, 435-436 (5th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3337 (Nov. 3, 1998) (No. 98-739); Varner, 150 F.3d at 709-717; Timmer, 104 F.3d at 838-839.

Congress can be found to use its Section 5 authority when extending the scope or remedies under a statute, even if Congress elects to extend the statute to only a subset of governmental units (i.e., those receiving federal financial assistance). For example, Title VII applies only to a government employer that "engage[s] in an industry affecting commerce [and] who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). But the Supreme Court in Fitzpatrick found that Congress, in extending Title VII to government employers meeting those conditions, was acting pursuant to Section 5 of the Fourteenth Amendment. Similarly, this Court in Mitten v. Muscogee County School District, 877 F.2d 932, 937 (1989), cert. denied, 493 U.S. 1072 (1990), held that the Education for the Handicapped Act was a valid exercise of Congress' Section 5 authority even though it was tied to the receipt of federal funds, and thus was also an exercise of the Spending Clause.

Instead of looking for evidence of Congress' subjective intentions as to the source of its authority, we believe so long as Congress could have enacted Title VI's substantive and

remedial provisions (including the abrogation) under the Fourteenth Amendment, the entire provision should be found to be a valid exercise of Congress' power. See Lesage, 153 F.3d at 218. Consistent with the four other courts of appeals to address the issue, see pp. 15-16, supra, the Seventh Circuit explained:

> It is not at all unlikely that Congress, perceiving the possible limits upon its Fourteenth Amendment power over non-State actors, initially chose to use its Spending Clause power to bind such actors to the requirements of Title IX. When Congress subsequently chose, via [Section 2000d-7], to make those same strictures more readily enforceable against State-run schools, it used the already existing federal funds framework of Title IX. Congress' consistent use of federal funds as the "trigger" for Title IX coverage, however, does not mean that it did not also intend to act pursuant to its acknowledged powers over State actors granted by Section 5 of the Fourteenth Amendment.

Doe, 138 F.3d at 659 (citations, brackets, ellipses, and some quotation marks omitted).

Thus the abrogation of States' Eleventh Amendment immunity for Title VI may be upheld as a valid exercise of Congress' Section 5 authority, even if Congress originally intended only to exercise its Spending Clause Power in enacting Title VI.

C. This Action May Proceed Against Defendant Hagan In His Official Capacity Under the Doctrine of Ex parte Young

If this Court were to find Section 2000d-7 ineffective, this action can still proceed against defendant Hagan, a state official sued in his official capacity for injunctive relief. The doctrine of Ex parte Young, 209 U.S. 123 (1908), "'permits federal courts to enjoin state officials to conform their conduct to the requirements of federal law, even if there is an ancillary impact on the state treasury.' As the Court has recently reinforced [in Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct.

2028, 2040 (1997)], a plaintiff's claim seeking prospective injunctive relief against a state officer's ongoing violation of federal law can ordinarily proceed in federal court." Doe v. Chiles, 136 F.3d 709, 719 (11th Cir. 1998).

In Seminole Tribe, 517 U.S. at 73-74, 76, the Court found that Congress' decision to enact a "carefully crafted and intricate remedial scheme" for enforcing the statutory rights created by the Indian Gaming Regulatory Act, including provisions that limited the court to strictly regimented procedures to adduce compliance, "strongly indicate[d] that Congress had no wish" to permit a suit under Ex parte Young. Thus the Court concluded that the limited remedial scheme reflected a congressional intent not to permit plaintiffs to rely on Ex parte Young. Id. at 75 n.17.

Contrary to defendants' suggestion (Br. 36-37), Title VI does not contain such a "detailed remedial scheme." Id. at 74. Although Title VI does not expressly authorize private enforcement, it is settled that a private right of action does exist. What remedies are available is governed by the "general rule" under which "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 70-71 (1992). And such relief clearly includes prospective injunctions. See Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1201 n.37 (11th Cir.), cert. denied, 500 U.S. 942 (1991). Thus, the remedial scheme available for Title VI extends to precisely the type of actions encompassed

by the Ex parte Young doctrine.

In addition to permitting a Title VI suit for injunctive relief to proceed against a state official in Cone, this Court has permitted Ex parte Young suits to proceed against state officials under Section 504 of the Rehabilitation Act, which expressly incorporates Title VI remedies. See 29 U.S.C. 794a(a)(2); Lussier v. Dugger, 904 F.2d 661, 670 n.10 (11th Cir. 1990); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); see also Brennan v. Stewart, 834 F.2d 1248, 1255, 1260 (5th Cir. 1988). There is no reason for a different result in this case.[5]

[5/] If this Court finds that the Eleventh Amendment bars this action in toto, the appropriate disposition would be to vacate the district court's injunction and remand for dismissal without prejudice. See Wilger v. Department of Pensions & Sec., 593 F.2d 12, 13 (5th Cir. 1979); Cone, 921 F.2d at 1192 & n.3. Plaintiffs would then have the opportunity to bring their claims in state court, where the Eleventh Amendment is no bar. See Kimel v. Board of Regents, 139 F.3d 1426, 1429 n.4 (11th Cir. 1998) (opinion of Edmondson, J.); Hufford v. Rodgers, 912 F.2d 1338, 1341 & n.1 (11th Cir. 1990), cert. denied, 499 U.S. 921 (1991); see also Coleman v. Alabama State Docks Terminal Ry., 596 So.2d 912, 913 (Ala. 1992) (entertaining federal cause of action against State that was barred in federal court by Eleventh Amendment); Arrington v. Associated Gen. Contractors of Am., 403 So.2d 893 (Ala. 1981) (adjudicating Title VI claim brought by private plaintiff), cert. denied, 455 U.S. 913 (1982).

II

PRIVATE PLAINTIFFS MAY SUE TO ENFORCE TITLE VI REGULATIONS BARRING DISCRIMINATORY EFFECTS

Congress enacted 42 U.S.C. 2000d as Title VI of the Civil Rights Act of 1964. Section 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 2000d-1 provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * * is authorized and directed to effectuate the provisions of section 2000d of this title * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1. To coordinate Title VI implementation, compliance, and enforcement activities of Federal agencies, Congress vested the President with the authority to approve all such regulations. Ibid. "Shortly after the enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use 'criteria or methods of administration which have the effect of subjecting individuals to discrimination.'" Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (quoting 45 C.F.R. 80.3(b)(2) (1964)). Following the promulgation of the initial regulations, "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination." Guardians, 463 U.S. at 592 n.13 (White, J.).

A. Individuals May Enforce Valid Federal Regulations When A Private Right Of Action Has Been Implied Under The Statute

Individuals have a private right of action to enforce their Title VI right to be free from discrimination on the basis of race and national origin in any program or activity receiving federal financial assistance. See Guardians, 463 U.S. at 594-595 (White, Rehnquist, JJ.), 625-626 (Marshall, J.), 635-636 (Stevens, Brennan, Blackmun, JJ.); Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1201 n.37 (11th Cir.), cert. denied, 500 U.S. 942 (1991). This cause of action derives from Congress' intent to invest in individuals an enforceable right to be free from discrimination, see Montgomery Improvement Ass'n v. HUD, 645 F.2d 291, 295 (5th Cir. 1981), and from the fund recipient's binding promise to the federal government not to discriminate against individuals on the basis of race or national origin as proscribed by the statute and regulations, see Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847, 850-851 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Lau v. Nichols, 414 U.S. 563, 571 n.2 (1974) (Stewart, J., concurring in judgment).

Pursuant to Section 2000d-1, both the United States Department of Transportation and the Department of Justice have promulgated regulations that provide that a recipient of federal funds "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination because of their race, color, or national origin." 49 C.F.R. 21.5(b)(2) (DOT); 28 C.F.R. 42.104(b)(2) (DOJ). As defendants

concede (Br. 27), these discriminatory effects regulations are valid exercises of agency authority under Section 2000d-1. Although the Supreme Court's decision in Guardians is comprised of six separate opinions, the proposition that regulations prohibiting discriminatory effects are valid Title VI implementation regulations clearly garnered the approval of a majority of the Court. See 463 U.S. at 584 n.2 (White, J.), 623 n.15 (Marshall, J.), 642-645 (Stevens, Brennan, Blackmun, JJ.). In Alexander v. Choate, 469 U.S. 287, 293 (1985), a unanimous Court confirmed that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI." This Court reached the same conclusion in Georgia State Conference v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985), and Elston v. Talladega County Board of Education, 997 F.2d 1394, 1406 (11th Cir. 1993).

As valid substantive (also known as legislative) regulations, the discriminatory effects regulations have "'the force and effect of law.'" Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).[6] In conjunction with the Supremacy Clause,

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[6] A substantive regulation is a one that (1) is based on a delegation of an express grant of authority by Congress; (2) implements the statute; and (3) "affect[s] individual rights and obligations." Id. at 302-303. The effects regulations meet these requirements. First, 42 U.S.C. 2000d-1 "authorize[s] and direct[s]" each federal agency "to effectuate the provisions of section 2000d * * * by issuing rules, regulations or orders of

(continued...)

these regulations preempt state and local rules that conflict with their requirements. See id. at 295-296; Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985); Blum v. Bacon, 457 U.S. 132, 145-146 (1982).

[6/](...continued)
general applicability." See Chrysler Corp., 441 U.S. at 304 & 305 n.35 (Title VI contains a "delegation of the requisite legislative authority by Congress" to establish substantive regulations). Second, a majority of the Justices in Guardians held that the effects regulations are a valid implementation of the statute. Third, the rules affect the "obligations" of fund recipients and the "rights" of persons Title VI protects.

Although not expressly applying this test, a majority of the Justices in Guardians viewed the effects regulations promulgated under the statute to be substantive regulations. Justice Stevens' opinion held that because Section 2000d-1 authorized the agencies to promulgate the regulations, these regulations "have the force of law." 463 U.S. at 643. Four other members of the Court disagreed with Justice Stevens' conclusion as to the validity of the regulations, but agreed with his view that they were to be analyzed as substantive regulations. See Guardians, 463 U.S. at 611 n.5 (Powell, Burger, Rehnquist, JJ.) (discussing agencies' "lawmaking power"), 613-615 (O'Connor, J.) (analyzing regulations as "legislative regulations" that "hav[e] the force of law").

Federal courts have the authority to enjoin the enforcement of state rules that conflict with these valid Title VI regulations in suits by private plaintiffs. First, such an action falls under the traditional authority of a federal court to declare a state regulation or policy preempted and enjoin its continued enforcement. See Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 259 n.6 (1985); Barnett Bank of Marion County, N.A. v. Gallagher, 43 F.3d 631, 633 (11th Cir. 1995) (in suit seeking declaration that federal law preempts state law, "a federal court has federal question jurisdiction to decide a claim against a state officer or agency alleging that a federal statute preempts a state statute under the Supremacy Clause and that the state statute cannot be enforced"), rev'd on other grounds, 517 U.S. 25 (1996); accord Burgio & Campofelice, Inc. v. New York State Dep't of Labor, 107 F.3d 1000, 1006-1007 (2d Cir. 1997); Bristol Energy Corp. v. Public Utils. Comm'n, 13 F.3d 471, 474 (1st Cir. 1994); Western Air Lines, Inc. v. Port Auth., 817 F.2d 222, 225-226 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

In addition, the private right of action implied under Title VI includes enforcement of valid legislative regulations promulgated thereunder. That was the holding of this Court's decision in Georgia State Conference, 775 F.2d at 1417, and implicit in Elston, 997 F.2d at 1406, both of which adjudicated such claims on the merits. It is also the consistent position of the courts of appeals. See Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936-937 (3d Cir. 1997) (so holding, and collecting cases from the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits), vacated as

moot, 119 S. Ct. 22 (1998);[7] see also Association of Mexican-American Educators (AMAE) v. California, 836 F. Supp. 1534, 1547-1548 (N.D. Cal. 1993), appeal pending, No. 96-17131 (9th Cir.).

The Supreme Court has not articulated a specific test for determining when valid substantive regulations may be enforced by

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[7/] Defendants suggest (Br. 25-26) that Chester should be ignored because it was vacated as moot by the Supreme Court. That decision, however, represents the considered opinion of three appellate judges acting on what was, at that point, a live case and controversy. Although no longer binding Third Circuit precedent, it retains a persuasive authority. See Barrett v. Harrington, 130 F.3d 246, 258 n.18 (6th Cir. 1997) ("Because this Court only looks to the case as persuasive authority, it is irrelevant that the case has been vacated; the case occurred in [another] Circuit and therefore this Court would not be bound by the decision even if it had not been vacated."), cert. denied, 118 S. Ct. 1517 (1998); Orhorhaghe v. INS, 38 F.3d 488, 493 n.4 (9th Cir. 1994); United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) ("[V]acating a decision because of supervening mootness does not destroy its precedential effect. The purpose of setting aside a decision on that ground is only to prevent the decision from having res judicata or collateral estoppel effect in future cases."); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc) ("Even if a decision is vacated, however, the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes.").

private parties absent express legislative authorization.[8] Once the Court has found that Congress intended individuals to enforce a statutory right through an implied private right of action, however, it has allowed individuals to enforce federal agency regulations implementing that statute. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). "Such a conclusion was, of course, entirely consistent with the Court's recognition in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'" 421 U.S. at 730 (emphasis added).

The statutory cause of action serves as a gateway for the enforcement of valid regulations. Thus, for example, this Court has routinely permitted private actions to proceed claiming violations of various Securities and Exchange Commission rules even absent an express cause of action. See, e.g., Rosen v. Cascade Int'l, Inc., 21 F.3d 1520, 1524 (11th Cir. 1994) (Rule

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[8] 42 U.S.C. 1983 is an express cause of action that can be used to enforce some federal regulations. See Doe v. Chiles, 136 F.3d 709, 716 (11th Cir. 1998). A majority of the Justices in Guardians clearly thought that the disparate effects regulations were so enforceable. See 463 U.S. at 638 n.6, 645 n.18 (Stevens, Brennan, Blackmun, JJ.); id. at 608 n.1 (Powell, Burger, JJ.); Larry P. v. Riles, 793 F.2d 969, 986 & n.4 (9th Cir. 1984) (Enright, J., concurring in part). Plaintiffs, however, did not seek to enforce the regulations through Section 1983.

10b-5); Gladwin v. Medfield Corp., 540 F.2d 1266, 1270 (5th Cir. 1976) (Rules 14a-3 and 14a-9); see also Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419-425 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (extended discussion as to appropriateness of implying private right of action under Rule 14a-8). And in Gomez v. Florida State Employment Service, 417 F.2d 569, 575-576 (5th Cir. 1969), this Court permitted individuals to sue a regulated entity for violations of federal regulations intended to protect them. These cases are "consistent with the general rule, which holds that private rights of action may be implied from administrative regulations as well as from federal statutes, provided the private right of action may be inferred from the enabling statute." Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 250 n.10 (5th Cir. 1997).[9] They are also consistent with the common sense notion that "if Congress intended to permit private actions for violations of the statute, 'it would be anomalous to preclude private parties from suing under the rules

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[9/] See also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 536 (9th Cir. 1984); Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988); Ashbrook v. Block, 917 F.2d 918, 926 (6th Cir. 1990); cf. Useden v. Acker, 947 F.2d 1563, 1582 (11th Cir. 1991), cert. denied, 508 U.S. 959 (1993) (declining to imply private right of action from regulation because it was not intended to benefit plaintiff); Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544, 1548 (11th Cir. 1985) (declining to imply private right of action from regulation because it did not have the force and effect of law).

* * *'" implementing the statute. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 947 (3d Cir.), cert. denied, 474 U.S. 935 (1985).

B. Private Enforcement Of Title VI Discriminatory Effects Regulations Is Consistent With The Purposes And Structure Of The Statute

Private enforcement of valid Title VI regulations furthers the purposes of the statute. Title VI "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). Like the relevant executive agency in Cannon, the United States "perceive[s] no inconsistency between the private remedy and the public remedy. On the contrary, the [government] takes the unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes." Id. at 706-707; see also Allen v. State Bd. of Elections, 393 U.S. 544, 557 n.23 (1969).

Permitting individuals to enforce agency regulations in federal court is consonant with the Supreme Court's discussion in Choate. The DOT and DOJ, like virtually all other federal agencies, have determined that "disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." Choate, 469 U.S. at 293-294. Reliance solely on administrative

proceedings to enforce the discriminatory effects regulation is inappropriate. As the Court explained, "Title VI had delegated to agencies in the first instance" the question of what constituted prohibited discrimination, but once the agency had issued regulations, such regulations could "make actionable the disparate impact." Id. at 293, 294 (emphases added).

The United States relies on private persons to act as "private attorneys general" to ensure optimal enforcement of the regulations. Cf. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam). The U.S. Commission on Civil Rights recently reported that "Federal agencies' budget and staffing for Title VI implementation and enforcement activities have declined as their civil rights workload has increased. As a result, few Federal agencies devote sufficient resources to Title VI to ensure that the agency and its recipients are in compliance with Title VI's nondiscrimination provision." Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs 7 (June 1996). In light of agency resource constraints, private enforcement of Title VI regulations assists the United States in furthering the purposes of Title VI by meeting "the need to provide a high enforcement level to deter violations, * * * and to allow [injured parties] to protect themselves from irreparable harm through an injunction." Polaroid Corp. v. Disney, 862 F.2d 987, 997 (3d Cir. 1988).

Private enforcement of the regulations is also necessary to provide individual citizens effective protection against unlawful practices. Requiring individuals to invoke administrative procedures if they wish to rely upon the regulations implementing

the statute's general prohibition against discrimination may deny them relief from unlawful conduct not prohibited on the face of the statute. For example, retaliation for filing a complaint is prohibited by agency regulations, see, e.g., 28 C.F.R. 42.107(e); 49 C.F.R. 21.11(e), but such a prohibition does not appear in the text of the statute. Under the defendants' theory, individuals who believe they have been retaliated against would have to pursue relief through administrative channels. But "even if those [administrative] proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." Cannon, 441 U.S. at 707 n.41. Indeed, requiring invocation of such procedures may be ineffectual for "the agency may simply decide not to investigate [a complaint] -- a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint." Ibid. Unsurprisingly, courts have consistently permitted private parties to sue fund recipients in federal court to enforce the right to be free from retaliation delimited by regulations. See, e.g., Lowrey, 117 F.3d at 250-254; Preston v. Virginia, 31 F.3d 203, 206 n.2 (4th Cir. 1994).

Defendants argue (Br. 26-27, 33, 38-39) that permitting a private right of action to enforce agency regulations would by-pass the notice and voluntary compliance requirements imposed by Section 2000d-1 on agencies when they are attempting to terminate federal funding. But plaintiffs are not seeking the drastic remedy of fund termination. Instead, they are seeking an injunction ordering defendants to comply with their extant obligations. "[U]nlike the [agencies], private plaintiffs do not

have the authority to terminate funding. As a result, the purpose that the requirements serve is not as significant in private lawsuits, where the potential remedy does not include the result (i.e., termination of funding) at which Congress directed the requirements. Stated differently, the requirements were designed to cushion the blow of a result that private plaintiffs cannot effectuate." Chester, 132 F.3d 935-936. In rejecting a similar argument as to whether the United States was limited to the remedies laid out in Section 2000d-1, this Court explained that the "permissive language" of Section 2000d-1 required it to conclude that "the fact that Congress intended to authorize a number of means of obtaining compliance with Title VI other than contract enforcement actions cannot be said to indicate that Congress intended to prohibit such actions as a means of obtaining compliance." United States v. Marion County Sch. Dist., 625 F.2d 607, 613 n.12 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981).

Moreover, any notice concerns are addressed by the complaint itself. As the Third Circuit explained in Chester, 132 F.3d at 935, "a private lawsuit also affords a fund recipient similar notice. If the purpose of the requirements is to provide bare notice, private lawsuits are consistent with the legislative scheme of Title VI." In addition, the courts may craft safeguards analogous to those provided in Section 2000d-1 to provide the same "grace period" for compliance in order to avoid entering sanctions against inadvertent violators. See United States v. Baylor Univ. Med. Ctr., 736 F.2d 1039, 1050 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); cf. Gardner v.

Alabama, 385 F.2d 804, 817 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968).

C. Congress' Subsequent Amendment To Title VI Ratified Private Enforcement Of The Discriminatory Effects Standard

In addition to diverging from settled judicial precedent, declining to permit private plaintiffs to enforce the discriminatory effects regulation would also be contrary to congressional intent. Since Guardians and Choate were decided, Congress has amended Title VI to broaden the scope of the statute's coverage while acknowledging the existence of a privately enforceable discriminatory effects standard. Congress has thus ratified the well-accepted practice of private enforcement of the discriminatory effects regulations.

In 1984, the Supreme Court decided Grove City College v. Bell, 465 U.S. 555 (1984), in which the Court interpreted the phrase "program or activity" in Title IX (a statute patterned after Title VI) to limit the coverage of Title IX's non-discrimination obligation to only portions of an entity receiving federal funds. In response to that decision, Congress engaged in a lengthy series of hearings and debates before enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). The Restoration Act rejected Grove City and defined the term "program or activity" for Title VI to include "all of the operations of" an entity, "any part of which is extended Federal financial assistance." Id. at § 6, 102 Stat. 31 (codified at 42 U.S.C. 2000d-4a).

There is no question that during these proceedings Congress was aware that the Supreme Court in Guardians had upheld agency discriminatory effects regulations as valid. See, e.g., H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 24 (1984); 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy). Participants in the deliberations expressly stated that private plaintiffs would be able to sue recipients of federal funds for violations of the regulations. For example, a House Report on an early version of the bill explained that the "private right of action which allows a private individual or entity to sue to enforce Title IX would continue to provide the vehicle to test [certain] regulations in Title IX [concerning discrimination against women who had abortions] and their expanded meaning to their outermost limits." H.R. Rep. No. 963, Pt. 1, 99th Cong., 2d Sess. 24 (1986) (minority views opposing enactment of bill). Indeed, Congress ultimately included a provision in the Act addressing the substantive question, see 20 U.S.C. 1688, rather than precluding a private right of action.

During the debates, Senator Hatch argued that "[t]he failure to provide a particular share of contract opportunities to minority-owned businesses * * * could lead Federal agencies to undertake enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. * * * Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges." 134 Cong. Rec. 4,257 (1988) (emphasis added); see also id. at 99-100 (1988) (Sen. Hatch) (discussing

enforcement of disparate impact standards by private plaintiffs); 130 Cong. Rec. 18,879-18,880 (1984) (Rep. Fields) (discussing Guardians and asking rhetorically "will a State be subject to private lawsuits because the tests have a disproportionate impact on minorities?").

This understanding was also prevalent among witnesses at the congressional hearings, at which both supporters and opponents noted the existence of the discriminatory effects regulations and the fact that they could be enforced in federal court by private parties. See Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Educ. & Labor and the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 734, 1095, 1099 (1985); Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 23-24, 153-154, 200 (1984).

Moreover, this understanding of the law was also put forth by the Executive Branch. A memorandum from the Office of Management and Budget submitted during the hearings quoted the Department of Education's discriminatory effects regulations and explained that "bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have 'discriminatory effects' would now be covered by the existing regulations for the first time and would be subject to agency enforcement activities and private lawsuits." Civil Rights Act of 1984, supra, at 530 (second emphasis added). It reiterated that expanding the definition of "program" would "open up all of a recipients' activities to private suits over

practices deemed to have 'discriminatory effects,'" brought by "members of the bar" acting as "private Attorneys General." Id. at 532.

"[I]n discerning what it was that Congress understood we necessarily attach great weight to agency representations to Congress when the administrators participated in drafting and directly made known their views to Congress in committee hearings." Lindahl v. OPM, 470 U.S. 768, 788 (1985) (internal quotation marks omitted). Congress understood that a discriminatory effects regulation could be enforced by private parties and, with that understanding in mind, broadened the scope of the statute. If Congress had intended by the 1988 amendment to expand the scope of the statute's coverage but not to extend the privately enforceable discriminatory effects standard, "there would presumably be some indication in the legislative history to this effect." Id. at 787. Here, there is none. To the contrary, the legislative history indicates that Congress did not intend to alter the substantive definition of what constituted discrimination. See S. Rep. No. 64, 100th Cong., 1st Sess. 29 (1987).

Under such circumstances, Congress' decision to amend part of the statute while leaving another part "intact suggests that Congress ratified" its understanding of how the discriminatory effects standard would be enforced. Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983); see also Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-382 (1982) (where Congress has conducted a reexamination and significant amendment of a statute and left intact the provisions under which

the federal courts had routinely and consistently implied a cause of action, this suggests that Congress affirmatively intended to preserve that remedy).

Given this Court's decisions in Georgia State Conference and Elston, the consensus in the other courts of appeals, and the clearly expressed congressional understanding, the district court in this case did not err in holding that the discriminatory effects regulations were enforceable by plaintiffs.

III

DEFENDANTS WERE ON NOTICE THAT A POLICY DENYING THE BENEFITS OF ITS PROGRAM TO THOSE WHO CANNOT READ ENGLISH COULD BE FOUND TO VIOLATE TITLE VI DISCRIMINATORY EFFECTS REGULATIONS

Defendants do not challenge any of the district court's factual findings, or the district court's use of the Title VII disparate impact legal framework in analyzing plaintiffs' Title VI challenge. Nor do they contest the district court's application of the facts to the legal framework. Instead, defendants claim (Br. 40-54) that because Title VI is Spending Clause legislation,[10] they were entitled to notice that accepting federal funds would prohibit them from requiring driver's license

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[10/] Although, as we noted on pp. 13-19, supra, the abrogation for Title VI may withstand constitutional challenge as an exercise of Congress' Section 5 authority, this Court has held that it is to be viewed for purposes of statutory interpretation as Spending Clause legislation. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1398-1399 (11th Cir. 1997) (en banc), petition for cert. granted, 119 S. Ct. 29 (1998).

applicants to read English, that they did not receive that notice, and thus an English-only rule could never be in violation of Title VI. This argument is wrong in two ways.[11]

A. Title VI And Its Discriminatory Effects Regulations Alone Provide Sufficient Notice To Recipients That Accepting Federal Funds Will Limit Their Ability To Exclude Individuals Who Do Not Speak English From The Benefits Of Their Programs

Defendants are demanding notice at an unrealistic level of specificity. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981), requires that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." Once it is clear that a funding statute comes with "strings" attached, however, the scope of the obligations is governed by normal rules of statutory interpretation, including deference to agency regulations. That the recipient may be "surprised" by the court's application of a statute and its regulations to a given situation does not mean it was not sufficiently on notice. As the Court explained in Bennett v. Kentucky Department of Education, 470 U.S. 656, 669 (1985), although a contract analogy may be helpful in some instances, in the end Spending Clause legislation is legislation and "remain[s]

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[11] If, as we believe, defendants' arguments on this point are erroneous, and given their failure to mount a legal or factual challenge to any other aspect of the district court's decision, it would follow that this Court should affirm the district court's liability determination.

governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." As long as the recipient is on notice that the federal money it is receiving has conditions attached, Pennhurst does not require that "every improper" action be "specifically identified and proscribed in advance." Id. at 666; see also id. at 669 ("Given the structure of the grant program, the Federal Government simply could not prospectively resolve every possible ambiguity concerning particular applications of the [statute's] requirements.").[12]

Thus, for example, in determining whether catheterization was a "related service" that fund recipients were required to provide under the Education of the Handicapped Act, the Court made clear that although recipients had to be on notice that providing "related services" was a condition for receiving federal funds, it was appropriate to rely on agency regulations to define the breadth of the services required. See Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891-892 & n.8 (1984); see also Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1577 (11th Cir. 1983) ("Pennhurst is simply inapposite" when Congress made it clear that States had the duty to provide

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[12/] Defendants' reliance (Br. 42, 43) on Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998), is also unavailing. The Court's holding that a recipient must have notice about the unauthorized actions of individuals before being liable in damages for those actions, see id. at 1998-1999, is no support for the proposition that a recipient must have actual knowledge that its policies and practices are unlawful.

individualized education to each child with a disability; court could properly order recipient to provide student with year-round schooling even though such a service "was absent from the statute's explicitly required 'contract' terms"), vacated, 468 U.S. 1213 (1984), reinstated in pertinent part, 740 F.2d 902 (11th Cir. 1984), cert. denied, 469 U.S. 1128 (1985).

Similarly, in interpreting Section 504 of the Rehabilitation Act, 29 U.S.C. 794, the Supreme Court declined to apply Pennhurst because Section 504's obligation not to discriminate was clear. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 286 n.15 (1987). It determined the scope of the non-discrimination obligation based on "basic canons of statutory construction," including "the detailed regulations that implement" the statute. Ibid. This Court relied on Arline to reject a Pennhurst-based claim that Section 504 did not give a recipient sufficient notice that it could be required to provide and pay for interpreters for deaf persons. See United States v. Board of Trustees, 908 F.2d 740, 750 (11th Cir. 1990). Instead, this Court found that the recipient was on notice of its general non-discrimination obligation, and deferred to agency regulations, and the agency's interpretation of its regulations, in finding that the recipient was not in compliance with that obligation. Id. at 746, 752.

It is an unambiguous condition on the receipt of all federal funds that recipients comply with Title VI's non-discrimination mandate and the agencies' implementing regulations. See Grove City College v. Bell, 465 U.S. 555, 575 (1984); Lau v. Nichols, 414 U.S. 563, 568-569 (1974); id. at 570-571 (Stewart, J., concurring in result); Op. 1264 (quoting provisions of contract

of assurance in which defendants agree to comply with "Title VI of the Civil Rights Act of 1964 * * * and applicable regulatory requirements"). It was enough the defendants were on notice that Title VI regulations prohibited recipients from using "criteria or methods of administration which have the effect of subjecting [individuals] to discrimination because of their" national origin. 49 C.F.R. 21.5(b)(2) (DOT); 28 C.F.R. 42.104(b)(2) (DOJ). They did not also have to know that serving only those persons who can read English could be found in some instances to violate these provisions.[13]

[13/] It has been suggested, see Guardians, 463 U.S. at 598 (White, J., joined by Rehnquist, J.), that a defendant must have actual or constructive knowledge that it is in violation of a legal duty in order for a private plaintiff to recover damages. Whatever the strengths of that argument in a case seeking compensatory damages, they carry no weight when the only remedy sought is prospective injunctive relief. In a typical case, a recipient may respond to a court opinion that puts it on notice of its specific obligations in a given circumstance by declining to accept federal funds in the future, thus relieving itself of any further obligations. See id. at 596-597; Doe v. Chiles, 136 F.3d 709, 722 (11th Cir. 1998).

B. Title VI And Its Regulations Have Been Consistently Interpreted To Limit Recipients' Ability To Exclude Individuals Who Do Not Speak English From The Benefits Of Their Programs

Moreover, the district court's holding that administering programs in a manner that would disparately exclude a group of people who did not speak or read English would implicate Title VI should not have come as a surprise to anyone.[14] In Lau, the Supreme Court recognized that a federal fund recipient's denial of an education to a group of non-English speakers violated Title VI and its implementing regulations. Although declining to dictate what remedial steps the school district was required to take, the majority opinion held that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program -- all earmarks of the discrimination banned by" the Title VI effects standard set forth in the regulations of the then-Department of Health, Education, and Welfare (HEW). 414 U.S. at 568; accord id. at 570-571 (Stewart, J., concurring in

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[14] Indeed, when Alabama's Attorney General reviewed defendants' English-Only policy in 1991, he noted that "requiring an ability to understand English as a requirement to participate in some state programs might be a violation of Title VI of the Civil Rights Act of 1964," unless justified by important state interests (Op. 1286).

result).[15]

In response to Lau, the Department of Justice promulgated a provision which specifies the standard to be used by all executive agencies in defining the circumstances in which recipients must provide language assistance, in written form, to limited-English-proficient individuals:[16]

15/ While defendants attempt to distinguish Lau by noting that the Court did not opine as to the appropriate remedy (Br. 30-31, 53), they do not suggest that Lau is no longer good law. In fact, Congress immediately manifested its approval of Lau by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93-380, §§ 105, 204, 88 Stat. 503-512, 515 (currently codified at 20 U.S.C. 1703(f), and the Bilingual Education Act, 20 U.S.C. 7401 et seq.), that adopted the "essential holding" of Lau (see Castaneda v. Pickard, 648 F.2d 989, 1008 (5th Cir. 1981)) and provided funds to assist school districts in providing bilingual education to comply with Title VI and its regulations as interpreted in Lau. See H.R. Rep. No. 805, 93d Cong., 2d Sess. 69 (1974); S. Rep. No. 763, 93d Cong., 2d Sess. 44-45 (1974); see also 20 U.S.C. 7402(a)(15) ("the Federal Government, as exemplified by title VI of the Civil Rights Act of 1964 * * *, has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency").

16/ Since 1965, the Attorney General has been responsible for coordinating federal agencies' activities under Title VI. See

(continued...)

> Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

28 C.F.R. 42.405(d)(1).

Other federal agencies have likewise held longstanding positions that denying benefits of a program to individuals who cannot communicate in English implicates Title VI's prohibition on subjecting individuals to discriminatory effects on the basis of national origin. HEW, the predecessor to the Department of Education and Department of Health and Human Services (HHS), stated in a 1970 policy memorandum (cited with approval in Lau) that "[w]here [the] inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps * * * to open its instructional program to these students." 35 Fed.

[16/](...continued)
Exec. Order No. 11,247, 30 Fed. Reg. 12327 (1965); Exec. Order No. 12250, 45 Fed. Reg. 72,995 (1980). When Congress charges multiple agencies with enforcing a statute, the Supreme Court generally gives special deference to the regulations promulgated by the agency charged by Executive Order with coordinating government-wide compliance. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984); Andrus v. Sierra Club, 442 U.S. 347, 357-358 (1979).

Reg. 11,595 (1970).

In 1980, similarly, the Office of Civil Rights (OCR) of HHS announced that it "has conducted a large number of complaint investigations and compliance reviews in this area. In these cases, OCR has consistently concluded that recipients have an obligation under Title VI to communicate effectively with persons of limited English proficiency." 45 Fed. Reg. 82,972 (1980). As recently as last year, HHS issued a guidance memorandum that noted that "[t]he United States is * * * home to millions of national origin minority individuals who are limited in their ability to speak, read, write and understand the English language" and that "[b]ecause of these language barriers, [limited English proficiency (LEP)] persons are often excluded from programs or experience delays or denials of services from recipients of Federal assistance." It concluded that "[w]here such barriers discriminate or have had the effect of discriminating on the basis of national origin, OCR has required recipients to provide language assistance to LEP persons." (We have attached this memorandum, which was before the district court (Op. 1282), as an addendum to this brief.) See also Mary K. Gillespie & Cynthia G. Schneider, Are Non-English Speaking Claimants Served by Unemployment Compensation Programs?, 29 U. Mich. J.L. Ref. 333, 350 n.116 (1996) (collecting agency letters involving findings of noncompliance). These consistent interpretations by administrative agencies of their Title VI regulations are "controlling unless plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 117 S. Ct. 905, 911 (1997) (deferring to amicus brief filed by agency); see

also Bazemore v. Friday, 478 U.S. 385, 409 (1986); Board of Trustees, 908 F.2d at 746.

Defendants do not contest the existence of this longstanding administrative interpretation of Title VI and its regulations. Instead, they argue (Br. 52-53) that courts have rejected claims alleging that English-only rules have a disparate impact on the basis of national origin under Title VII, see Garcia v. Spun Steak Company, 998 F.2d 1480 (9th Cir.), cert. denied, 512 U.S. 1228 (1994); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981), and that those decisions should apply here as well. But those cases rejected challenges by bilingual employees to workplace rules prohibiting employees from speaking in languages other than English. These opinions reasoned that although the rule affected Hispanics disproportionately, the rule did not impose a hardship on persons who could speak both English and another language because those persons could always choose to speak in English. See Spun Steak, 998 F.2d at 1486, 1490; Gloor, 618 F.2d at 270-271.[17]

[17/] Defendants attempt to draw from the Ninth Circuit's rejection of the EEOC's presumption that employees who speak languages other than English will always be adversely effected when English-only rules are implemented, see 998 F.2d at 1489, the general rule (Br. 35-36, 54) that reliance on agency regulations about English-only policies is never appropriate. But Congress did not give the EEOC authority to promulgate substantive regulations, see EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991), so its interpretations of Title VII are not entitled to

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Even if this reasoning is correct, it is irrelevant to this case. Defendants ignore that in Spun Steak, the Ninth Circuit relied on Gloor to remand the case for further proceedings on whether a sufficient hardship had been shown by those employees who spoke no English. "As applied '[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,' an English-only rule might well have an adverse impact." Spun Steak, 998 F.2d at 1488 (quoting Gloor, 618 F.2d at 270). This is precisely the finding the district court made in this case: that there is a group of people (disproportionately foreign-born) who cannot read in English and who suffer a tangible adverse effect from defendants' English-only policy because they are deprived of driver's licenses for which they are otherwise qualified (Op. 1292, 1297-1298). Given the defendants' decision not to challenge the district court's factual finding that legitimate government interests were not substantially furthered by excluding these individuals from receiving regular driver's licenses (Op. 1298-

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17/ (...continued)
the same level of deference to which Title VI agency regulations and interpretations are entitled. And, as we note in the text, the Ninth Circuit agreed with the premise of the EEOC guideline -- that English-only rules have a disparate impact on the basis of national origin. The presumption rejected by the Ninth Circuit -- that such impacts were sufficiently adverse to rise to the level of a Title VII violation in every case -- was unnecessary in the instant case given the uncontested factual findings of the court.

1313),[18] the district court's judgment in the instant case falls

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[18/] Although States have a legitimate interest in complying with federal law, the federal government does not require States to test applicants for driver's licenses only in English. Federal law currently provides that drivers of commercial motor vehicles (defined to include vehicles weighing more that 10,000 pounds, designed to transport more than 15 passengers, or used to transport hazardous waste, see 49 C.F.R. 390.5), are not qualified unless they can "read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records" (49 C.F.R. 391.11(b)(2)). States are required to enforce this standard and compatible State regulations as a condition of receiving certain federal grants (49 U.S.C. 31102(a)). The English-language requirement is now under review (see 62 Fed. Reg. 45,200 (1997)). But even as presently written, it does not impose an English proficiency requirement on persons who seek a regular driver's license. Moreover, this provision does not require States to administer the commercial driver's licensing (CDL) test in English. "The [Federal Highway Administration] never made speaking English a specific prerequisite for the CDL, and, in fact, proposed and later authorized administration of the CDL test in foreign languages" (62 Fed. Reg. 45,200). Thus, the district court opinion does not call into question the validity of this federal regulation (see Op. 1309-1310 (distinguishing commercial driver's licenses on safety and other grounds)).

neatly in line with the rationale of Spun Steak and Gloor.

* * * * *

Defendants complain (Br. 48, 52) that the district court or- dered them to "speak in foreign tongues," and that such an order is unworkable. That complaint is premature at best. The dis- trict court held the defendants' per se rule was invalid "[w]ith- out deciding which practices meet the requirements of Title VI" (Op. 1306). It prohibited them from "enforcing * * * the Depart- ment's English-Only Policy," and ordered them to "fashion propos- ed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses" (Op. 1315-1316). Because the defendants have not yet proposed a means of compliance, much less had the district court rule on the sufficiency of their proposal, there is no reason to address what would constitute an appropriate court-ordered remedy in this case. See 28 C.F.R. 42.405(d)(1) (requiring recipients to take "reasonable steps"); Addendum at 1, 3 (noting need for flexibil- ity in choosing appropriate remedy).

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF SERVICE

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